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No. 86-1623

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOCAL 19, UNITED GLASS AND CERAMIC WORKERS, PETITIONER

v.

LORRAINE LE BEAU, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, on the particular facts of the case, the Equal Employment Opportunity Commission's prosecution of this Title VII suit was so frivolous, unreasonable, or without foundation that attorneys fees could properly be awarded to the prevailing defendants.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B39) with respect to the attorneys fees issue is reported at 799 F.2d 1152; the opinion of the court of appeals (Pet. App. D1-D20) with respect to the merits is reported at 727 F.2d 141. The opinion of the district court (Pet. App. C1-C7) with respect to the attorneys fees issue is unofficially reported at 36 Fair Empl. Prac. Case. (BNA) 910; the opinion of

the district court (Pet. App. E1-E28) with respect to the merits is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1986. A petition for rehearing was denied (Pet. App. A1-A2) on January 7, 1987. The petition for a writ of certiorari was filed on April 7, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Libbey-Owens-Ford Company (LOF) has operated two automobile glass manufacturing plants in Ottawa, Illinois since the early 1930s (Pet. App. E10). From the beginning, LOF was subject to the requirements of the Illinois Female Employment Act (Ill. Rev. Stat. ch. 48, para. 5 (1945)), which made it unlawful to employ a woman for more than eight hours in any one day or more than 48 hours in any one week,[1] and limited the employment opportunities of females at the Ottawa plants (Pet. App. E11-E12). Specifically, LOF hired women only for a limited number of jobs in its "Plant No. 7," where automobile windshields and other auto-related glass products were manufactured, and to certain jobs in its "Plastics and Assembly" departments, where glass was laminated with plastic to make it shatterproof (Tr. 2776, 2782, 3065-3069). Senior women worked full-time in these "female positions"; junior women were maintained on an "extra board" list and sum-

[1] The pertinent provisions of the Illinois Female Employment Act are reprinted at Pet. App. G1-G2. The statute was enforceable by criminal penalties (*ibid.*).

moned to work only when a replacement or extra worker was needed; and a separate system of assignment, layoff, and recall was maintained for all female employees (Pet. App. B4, E11-E13). Petitioner, Local 19, United Glass and Ceramic Workers, was the exclusive collective bargaining representative of male and female production workers at the Ottawa plants during this period and approved of LOF's gender-based employment practices (*id.* at E10-E13).

When Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, however, LOF and petitioner became concerned that the gender-based employment practices put in place at the Ottawa plants might be challenged as unlawful (under the new federal law) (Pet. App. E24). They instructed their personnel managers and business representatives, respectively, to continue to comply with the Illinois Female Employment Act pending the issuance of guidelines by the Equal Employment Opportunity Commission (EEOC) concerning the requirements of Title VII (*id.* at E24-E26). EEOC issued those guidelines in December 1965, stating, in pertinent part, that it did "not believe that Congress intended to disturb [state] laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard," and that EEOC would "consider limitations or prohibitions imposed by such laws or regulations as a basis for application of the bona fide occupational qualification exception" of Title VII (29 C.F.R. 1604.1(c) (1965)).[2] After these guidelines were promulgated,

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[2] The EEOC's December 1965 guidelines are reprinted in full at Pet. App. H1-H6. The "bona fide occupational quali-

LOF and petitioner maintained without further inquiry or modification the extant hiring, assignment, and layoff practices at the Ottawa plants (Pet. App. B17-B19, B35-B36, D5-D7, D14-D16, E24-E26).

In August 1969, however, EEOC reversed its position and amended its guidelines to provide that state laws that prohibit or limit the employment of females "conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception" (29 C.F.R. 1604.1(b)(2) (1970)). Accordingly, LOF and petitioner determined that they had to eliminate the gender-based employment practices at the Ottawa plants and entered into negotiations to do so (Pet. App. E27; see also *id.* at D7). By March 5, 1970, LOF was hiring, assigning, and laying off employees at the Ottawa plants without regard to gender (*id.* at D7, E27).[3]

2. On March 16, 1970, a female employee from one of the Ottawa plants, supported by 45 other female employees, filed a charge of employment discrimination with EEOC (Pet. App. D8) and, on

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fication" (bfoq) exception of Title VII is codified at 42 U.S.C. 2000e-2(e) and provides, in pertinent part, that "it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of [their] * * * sex * * * in those instances where * * * sex * * * is a bona fide occupational qualification *reasonably necessary* to the normal operation of that particular business or enterprise" (emphasis added).

[3] The Illinois Female Employment Act was invalidated in *Caterpillar Tractor Co.* v. *Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970).

August 3, 1971, after receiving a right-to-sue notice, filed a class action against LOF and petitioner, alleging that the gender-based employment system in place at the Ottawa plants during the 1965-1970 period had been maintained in violation of, and that LOF and petitioner were continuing to violate, Title VII (*ibid.*). The private female plaintiffs prayed that the court award them back pay and other injunctive relief (*ibid.*). The EEOC intervened in the suit in May 1975, and joined in the private plaintiffs' allegations of continuing discrimination and prayers for monetary and injunctive relief (*id.* at B4-B5, D9-D10, E3, E13-E14).

In their answers, LOF and petitioner did not deny that they had discriminated against female employees during the 1965-1970 period. Rather, they asserted, as an affirmative defense, that the challenged gender-based employment practices had been used to comply with the Illinois Female Employment Act and that, in doing so, LOF and petitioner had justifiably relied on the EEOC's 1965 guidelines (and, accordingly, were immune (under 42 U.S.C. 2000e-12(b))[4] from liability) (Pet. App. B6, B17, E15). The EEOC countered that the particular gender-based employment practices being challenged were not mandated by the Illinois Female Employment Act, that less restrictive alternatives were available, and that LOF and petitioner had used and were continuing to

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[4] 42 U.S.C. 2000e-12(b) provides, in pertinent part, that "no person shall be subject to any liability or punishment for or on account of * * * the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission."

use the Illinois statute and the 1965 guidelines as a pretext for otherwise unjustifiable employment discrimination (*id.* at B17). Although it did not dispute that the discriminatory practices had been abolished in 1970, EEOC did not abandon its claim of continuing discrimination until October 1978 (*id.* at B16 & n.11).

In this posture, the district court denied motions by LOF and petitioner to dismiss or for summary judgment and docketed the case for trial (Pet. App. B5). At trial, neither LOF nor petitioner asserted or attempted to prove that overtime was required in all jobs from which females were excluded at the Ottawa plants (*id.* at B18 n.12). Rather, they attempted to show that, where any position in a continuous production department (i.e., a department other than the Plastics and Assembly departments) required overtime, the entire department had to be considered appropriate for only male employees (*ibid.*). Their witnesses testified that, under the "90-day change" procedure of the seniority system,[5] employees had to be able to perform every job (including jobs requiring overtime) in their respective departments and that, because of the continuous nature of the production process (together with the expense of providing fringe benefits), it was impractical to rely upon part-time employees to fill recurrent overtime needs in departments other than Plastics and Assembly (*ibid.*; see also *id.* at D4-D6, E12, E15). In rebuttal, the EEOC attempted to show: that there

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[5] Under the "90-day change" procedure, employees were entitled every 90 days to "bump" less senior employees from particular jobs in their respective departments. See Pet. App. B18 n.12; Tr. 2807-2808, 3099-3100.

were other departments (besides Plastics and Assembly) that required little overtime work; that LOF had merely imported the gender-based employment system in place in the Ottawa plants from its Toledo, Ohio plant (where the state law protecting females was more restrictive than was the Illinois Female Employment Act); that employees at the Ottawa plants considered overtime desirable and often performed overtime on jobs on which they had not worked the first eight-hour shift; and that neither LOF nor petitioner had seriously examined any less discriminatory alternative employment systems (*id.* at 17-18 & n.12, B37 n.13; Tr. 3143-3146).[6]

The district court rendered judgment for LOF and petitioner in March 1982 (Pet. App. E1-E28). It found "substantial and persuasive testimony * * * that the use of part-time employment, separate seniority lists and employment in Plastics and Assembly only[] [was] crucial to [LOF] in a good faith, determined effort on its part to comply with the Illinois Female Employment Act" (*id.* at E22), and that "the evidence is overwhelming that for both [LOF] and Local 19 reliance on the guidelines of [EEOC] was in fact in good faith" (*id.* at E26). The Seventh Circuit affirmed that judgment (Pet. App. D1-D20), reasoning that, under the EEOC's

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[6] Although EEOC did not offer any proof concerning the feasibility of any such alternatives, it suggested that LOF and petitioner could have considered modifying the "90-day change" procedure so that women could occupy jobs in other departments not specifically requiring overtime, using an "extra board" in departments other than Plastics and Assembly, or simply denying women the right to bump into jobs requiring overtime. See Tr. 2811, 3140-3141, 3143-3146, 3166, 3174, 3186, 3188-3190.

guidelines, employment practices designed to comply with state "female protective" legislation could form the basis of a bona fide occupational qualification (*id.* at D13), that the employment system in place at the Ottawa plants "me[]t the definition of 'a bona fide occupational qualification reasonably necessary to the normal operation' of LOF's business" (*id.* at D13-D14), and that, "[l]ooking at the record as a whole and without regard to whether the 'clearly erroneous' test be applied or not, there is no basis for setting aside the finding of the District Court that [LOF and petitioner] relied in good faith on the 1965 EEOC guidelines" (*id.* at D16).

3. On remand, the district court awarded attorneys fees to LOF and petitioner for their defense of the trial and appeal of this action (Pet. App. C1-C7). It ruled (*id.* at C2-C4) that "the suit by the EEOC was frivolous, unreasonable, [and] groundless" within the meaning of this Court's decision in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), reasoning that: (a) "[f]or the EEOC this case clearly was not one of first impression," since a similar challenge to LOF's gender-based employment practices had been rejected in *Raitz* v. *Libbey-Owens-Ford Glass Co.*, No. 70-99 (N.D. Ohio Sept. 23, 1973) (Pet. App. C2-C3); (b) "there was no real threat [of injury to the female class] because any discriminatory practices regarding women employees * * * had ceased in March of 1970, twelve years before trial and five years before the EEOC's intervention" (*id.* at C3); (c) "for the EEOC to have proceeded with this case in light of its own guidelines was the apex of unreasonableness" (*id.* at C4); and (d) "the appeal on these issues was as unreasonable as the pursuit of these issues at the trial court level" (*id.*

at C5). The court awarded $132,877 and $181,100 in attorneys fees to petitioner and LOF, respectively (*id.* at C7).

4. On appeal, a divided panel of the Seventh Circuit reversed (Pet. App. B1-B39). The majority noted that "a prevailing defendant [may] recover fees only upon a showing that 'the plaintiff's action was frivolous, unreasonable, or without foundation * * * or that the plaintiff continued to litigate after it clearly became so' " (*id.* at B7 (quoting *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 421-422)). The majority further noted that "[t]he decision whether or not to award attorneys' fees is committed to the discretion of the district judge * * * and never lightly reversed" (Pet. App. B7 (citation omitted)). But the majority detected error in each of the district court's reasons for awarding attorneys fees and thus concluded that this was one of those exceptional cases in which an abuse of discretion should be found (*id.* at B8-B9).

a. The majority began its analysis by criticizing the district court's statement that the decision in *Raitz* v. *Libbey-Owens-Ford Co.*, *supra*, was a factor rendering this suit frivolous (Pet. App. B9-B12) The majority noted that, earlier in this case, the district court had denied motions by LOF and petitioner to dismiss and for summary judgment on the ground that, in contrast to the *Raitz* case, questions of material fact existed concerning whether LOF and petitioner had relied in good faith on the EEOC guidelines and the Illinois Female Employment Act (*id.* at B10-B11). While unwilling "to suggest * * * that no suit that survives a motion for summary judgment can ever be found frivolous" (*id.* at B12 n.7), the majority found "highly inconsistent" the district

court's reasons for doing so here, since that court had previously held that the *Raitz* case was not an "impediment to bringing this suit" (*ibid.*).

The majority similarly rejected the district court's suggestion that "there was no 'real threat of injury' to the women plaintiffs because the discrimination had ended before they brought their suit" (Pet. App. B12). The majority noted that "damage suits are not by their nature more frivolous than suits for injunctions" (*ibid.*) and that, "[i]f the district court had believed that the women had suffered no cognizable injury, there would have been no need to address the affirmative defenses of good faith reliance" (*id.* at B13). The majority was therefore unwilling to "place great weight on the district court's 1984 finding that there was 'no real threat of injury' to the plaintiffs" (*id.* at B14).

The majority next found the district court's "assessment of the merit of the EEOC's suit * * * [to be] flawed" (Pet. App. B15). The majority noted that "the district court sent this case to trial on the premise that the EEOC was not simply 'condemning [LOF and petitioner] for having followed its guidelines[,]' but rather was seeking to establish that [they] were using the guidelines as a pretextual justification for their discriminatory practices" (*ibid.* (citations omitted)). The majority then determined that, "although a review of the record * * * [reveals] that the EEOC did not always manage this case as wisely as it now claims or as one might wish, it also shows that [EEOC] did not bring or conduct this suit in a manner that could be labelled 'frivolous' or 'unreasonable' " (Pet. App. B16-B17 (footnote omitted)). The majority reasoned (*id.* at B18-B19 n.12 (emphasis in original)) that EEOC had "put

in *some* evidence tending to show that the asserted 'reliance' [on the Illinois Female Employment Act and the 1965 EEOC guidelines] was merely pretext," noting that "EEOC elicited testimony suggesting that when LOF opened its Ottawa plant it simply imported the 'extra board' system from Toledo, where LOF was subject to a more stringent Ohio protective statute," that "[t]here was also testimony that suggested that LOF did not endeavor to tailor its operations closely to the requirements of the Illinois statute," and that "[i]n fact between 1965 and 1970 LOF never considered *any* alternative to the extra board system."

Finally, the majority found error in the district court's ruling that LOF and petitioner "were entitled to attorneys' fees for defending a frivolous appeal" (Pet. App. B19). The majority noted that, "[o]n appeal, the EEOC argued * * * that the district court had incorrectly concluded the 'good faith reliance' issue by inquiring whether LOF in fact used these employment practices * * * instead of asking whether LOF *had to* use these practices to avoid violating the statute," that LOF and petitioner "had not proven their actual reliance upon the 1965 guidelines," and that "the 1965 guidelines 'did not authorize' defendants' employment practices" (*ibid.* (emphasis in original)). The majority then said that, although the panel on the prior appeal had rejected these arguments, "[the] rejection of the EEOC's arguments does not, without more, make them frivolous" (*ibid.*) and that, viewed in context, the "EEOC's appellate position * * * was [not] frivolous, unreasonable or without foundation" (*id.* at B23).

b. Judge Eschbach dissented (Pet. App. B24-B39). He agreed with the majority that attorneys fees may be awarded to a prevailing defendant only where a plaintiff's suit "has no reasonable basis, whether in fact or law" (*id.* at B24 (citations omitted)). But a review of the record (see *id.* at B26-B38) led him to conclude that there was a "complete absence of any reasonable evidence on the part of the EEOC to support its claims" and, accordingly, "that the EEOC could not have reasonably believed that it could rebut LOF's defense" (*id.* at B26). In such circumstances, he believed that the court should "affirm the district court's award of attorney's fees to LOF and [petitioner]" (*id.* at B39).

ARGUMENT

The decision below does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision below turns on the particular facts of the case, establishes no new principle of law, and thus has no significant precedential value. In such circumstances, review by this Court is neither necessary nor warranted.

1. Petitioner first suggests (Pet. 19-20) that, in reversing the fee award here, the court below "subtly ignor[ed]" this Court's decision in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). But the court below expressly relied on the decision in *Christiansburg Garment* in adjudicating this case: Quoting *Christiansburg Garment*, 434 U.S. at 421-422, it said that "a prevailing defendant [may] recover fees only upon a showing that 'the plaintiff's action was frivolous, unreasonable, or without foundation * * * or that plaintiff continued to litigate after it clearly became so' " (Pet. App. B7). More-

over, it noted with approval the warning in *Christiansburg Garment* that courts should avoid " 'the understandable temptation to engage in post hoc reasoning by concluding that, because the plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation" (Pet. App. B16, quoting 434 U.S. at 422). And, finally, it followed the instructions of *Christiansburg Garment* (see 434 U.S. at 431-434) in scrutinizing the reasons advanced by the district court in support of the attorneys fees awards (see Pet. App. B8-B23). Thus, whether the conclusion of the court below (that the district court abused its discretion) is correct or not, the suggestion that its decision ignores—subtly or unsubtly—the decision in *Christiansburg Garment* is unfounded.

2. Petitioner further errs in suggesting (Pet. 23-24) that the court below erred in holding that attorneys fees may not be awarded in cases where the court has previously denied a motion to dismiss or for summary judgment. Petitioner's premise is wrong. The court below explicitly stated that it was unwilling "[to] suggest * * * that no suit that survives a motion for summary judgment can ever be found frivolous" (Pet. App. B12 n.7). It held only that the reasons the district court gave *in this case* for denying the motions to dismiss or for summary judgment and for finding the EEOC's prosecution "frivolous" were "highly inconsistent" and, accordingly, could not support an award of attorneys fees (*id.* at B10-B12).[7] This holding is plainly correct.

[7] Specifically, the court noted that, in denying the motions to dismiss or for summary judgment, the district court had held that the *Raitz* case "was not an impediment to bringing suit" and yet, in finding the prosecution to be "frivolous," had

3. Petitioner similarly errs in suggesting (Pet. 22-23, 25-26) that the court below established a new standard for reviewing attorneys fees awards to prevailing defendants. Contrary to the petitioner's assertions, the court below did not hold that the reasonableness of a prosecution must be judged by the evidence that the plaintiff subjectively hoped to adduce at trial. The court below expressly disavowed any such holding (Pet. App. B18 n.12). It emphasized "what the EEOC 'tried to show' " only to demonstrate "that the EEOC's theory of the case ha[d] remained the same through the litigation and [was] not the product of *post hoc* rationalization" (*ibid.*). Moreover, it based its decision on its perception that the EEOC had "put in *some* evidence to show that the asserted 'reliance' [on the Illinois Female Employment Act and the EEOC's guidelines] was merely pretext" (*ibid.* (emphasis in original)). Thus, in contrast to petitioner, Judge Eschbach's dissent did not criticize the majority's decision for establishing a new standard of review in attorneys fees cases; rather, he agreed with the majority that attorneys fees may be awarded to a prevailing defendant only where a plaintiff's suit "has no reasonable basis, whether in fact or law" (Pet. App. B24) (citations omitted).[8]

4. The remainder of the petition (Pet. 20-23, 25-27) thus mirrors the dissent's claim (Pet. App. B24-B39) that, on the particular facts of this case, EEOC should not have proceeded with this prosecu-

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then criticized the EEOC for proceeding with the prosecution in the face of the adverse decision in the *Raitz* case (Pet. App. B10-B12).

[8] Judge Eschbach simply evaluated the evidence differently than did the majority. Compare Pet. App. B7-B9, with *id.* at B24, B26, B28, B35, B36, n.13.

tion and accordingly that the district court's judgment should have been affirmed. Though petitioner attempts to make a legal mountain out of this factual molehill, this claim clearly does not merit the Court's review; such a fact-bound decision establishes no new rule of law and can have no significant precedential effect.[9] In any event, the court below correctly concluded that there was a sufficient basis for a prosecution in this case.

First of all, the fact that the plaintiff in the *Raitz* case was unsuccessful in her challenge to the gender-based practices of LOF at its Toledo, Ohio plant could not support an award of attorneys fees against the EEOC in this case. The *Raitz* case involved a more stringent state "female protective" law and thus implicated an entirely different set of "good faith reliance" issues. More importantly, however, the government is under no obligation to acquiesce in non-controlling precedent from other jurisdictions—here a district court ruling in another circuit—even where it has been a party to such cases. See *United States* v. *Mendoza*, 464 U.S. 154 (1984) (the government is not subject to offensive collateral estoppel from its own unsuccessful litigation). Thus, the district court clearly erred in pointing to the *Raitz* decision as a factor making this prosecution frivolous.

The fact that LOF and petitioner abolished their gender-based practices twelve years before trial and five years before the EEOC's intervention in this case also does not support an award of attorneys fees. The EEOC alleged that, prior to their abolition, the

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[9] Petitioner in fact alleges (Pet. 22) that the decision below is "at variance" with other decisions of the Seventh Circuit. Petitioner does not, however, allege that that court has wrongly decided any subsequent case on the basis of this one or attempt to demonstrate that any such decisions are likely to ensue.

gender-based practices of LOF and petitioner unlawfully denied equal employment opportunity to female employees at the Ottawa plants. Had the EEOC been able to sustain its allegations, the female employees who were affected by these practices would presumptively have been entitled to "make-whole" relief. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). Accordingly, the district court was plainly wrong in suggesting that there was no "real injury" at issue in this litigation.

Finally, the fact that EEOC was unsuccessful in its prosecution of LOF and petitioner did not make this litigation frivolous. See *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. at 421-422. Rather, the critical question is whether there was a reasonable basis for prosecuting LOF and petitioner in this case. As the facts discussed by the court of appeals demonstrate (Pet. App. B17-B19), there was such a reasonable basis here and, accordingly, the awards of attorney fees were unwarranted. See *EEOC* v. *Kenneth Balk & Associates*, 813 F.2d 197, 198 (8th Cir. 1987) (attorney fees award inappropriate where plaintiff had "some basis" for pursuing action); *Glymph* v. *Spartanburg General Hosp.*, 783 F.2d 476, 480 (4th Cir. 1986) (same); *Mitchell* v. *Office of Los Angeles Superintendent*, 805 F.2d 844, 846-848 (9th Cir. 1986) (same); *Jones* v. *Continental Corp.*, 789 F.2d 1225, 1232-1233 (6th Cir. 1986) (same).

Specifically, LOF and petitioner conceded that they had engaged in facially discriminatory practices during the 1965-1970 period and that, pursuant to 42 U.S.C. 2000e-12(b), they had the burden of establishing (by a preponderance of the evidence) that they relied in "good faith" on the EEOC's guidelines in maintaining those practices throughout that period. Yet the facts showed that LOF and petitioner estab-

lished their gender-based employment practices before the EEOC's 1965 guidelines were even promulgated; that the guidelines merely stated that EEOC would "consider limitations or prohibitions imposed by such state laws or regulations as a basis for application of the bona fide occupational qualification exception;" and that, nonetheless, neither LOF nor petitioner performed any studies to determine how much or how frequently overtime was worked in the various departments and job-categories from which female employees were barred at the Ottawa plants or, more importantly, to determine whether the extant employment system was in fact reasonably necessary for compliance with the state law. Indeed, neither LOF nor petitioner seriously considered any alternative employment system. To the contrary, they maintained an employment system which had been imported from LOF's Toledo, Ohio plant, notwithstanding the fact that the Ohio female protective statute was more stringent than was the Illinois Female Employment Act. In these circumstances, it was not unreasonable to suggest that LOF and petitioner would be unable to establish their "good faith reliance" on the EEOC guidelines.

Indeed, even had the evidence of "good faith reliance" been more substantial, there was reason to doubt that the gender-based practices in place at the Ottawa plants were "in conformity with" the EEOC guidelines (and thus entitled to immunity under 42 U.S.C. 2000e-12(b)). As noted, the EEOC guidelines sanctioned those employment practices that satisfied the requirements of the "bona fide occupational qualification exception" of Title VII (29 C.F.R. 1604.1(c) (1965)). But the "bfoq" exception immunizes only those gender-based practices that are "reasonably necessary" to the normal operation of

the employer's business (see 42 U.S.C. 2000e-2(e)) and, as this Court has recently explained, the standard of "reasonable necessity" means that explicitly discriminatory practices must be "more than 'convenient' or 'reasonable' "; the employer (or union) must have "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [women] [are] unable to perform safely and efficiently the duties of the job involved," or that it is "impossible or highly impractical to deal with the [female] employees on an individualized basis" (*Western Air Lines* v. *Criswell*, 472 U.S. 400, 414 (1985)) (footnote omitted). See also *Dothard* v. *Rawlinson*, 433 U.S. 321, 333-334 (1977). Here, however, there was evidence tending to indicate that many jobs in the continuous production departments at the Ottawa plants did not require overtime, that many employees at the Ottawa plants considered overtime desirable and often performed overtime on jobs where they had not worked the first eight-hour shift, and that much overtime was performed by having employees work a sixth day in the week (which women were legally entitled to do). Thus, contrary to the hyperbole of the district court, it was not "the apex of unreasonableness" to suggest that these particular gender-based practices did not come within the scope of the EEOC guidelines and thus violated Title VII.

5. Nevertheless, the government must acknowledge, as did the court below (Pet. App. B16-B17), that this prosecution was not well handled by the EEOC.[10] The government believes that it should hold

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[10] The EEOC apparently adhered too long to its allegations of continuing discrimination (Pet. App. B16 & n.11, B39). In addition, in so far as the the EEOC's position below was

itself to a higher standard in challenging private action than the mere avoidance of frivolous conduct. We regret the burden imposed on petitioner, the courts below, and this Court, and have taken steps to avoid similar occurrences in the future. It remains clear, however, that under the applicable law governing awards of attorneys fees to prevailing defendants, the decision below is justified. And, in all events, the legal standards controlling here were definitively established by this Court in *Christiansburg Garment*; the question whether those standards were correctly applied to the particular facts of this case does not merit this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1987

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that the defendants could establish a bona fide occupational qualification only if they demonstrated that they used the "least restrictive means" available to comply with the Illinois Female Employment Act, this position was not consistent with the "reasonably necessary" language of Title VII or this Court's decision in *Dothard* v. *Rawlinson*, 433 U.S. 321, 334-337 & n.23 (1977).

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